U.S. Department of Justice

Environment and Natural Resources Division

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VIA EMAIL

Dale A. Coonrod
Deputy General Counsel
Office of the Special Deputy Receiver
222 Merchandise Mart Plaza
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Re: Centaur Insurance Company, in Rehabilitation

Dear Mr. Coonrod:

This Proof of Claim is filed by the United States at the request of the United States Environmental Protection Agency ("EPA"), the United States Department of the Interior ("DOI"), and the National Oceanic and Atmospheric Administration ("NOAA") against the Centaur Insurance Company ("Centaur") for a total amount of $11.75 million. The claim relates to the liability of Centaur under insurance policies issued to three of Centaur's insureds, each of which is liable to the United States under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, in connection with various Superfund sites. DOI and NOAA have a claim in the amount of $1.25 million with respect to the liability of Centaur under the $10 million excess umbrella liability policy issued to LCP Chemicals & Plastics, Inc. ("LCP") covering the period August 1, 1982 to August 1, 1983 ("LCP Policy"). EPA and DOI have a claim in the amount of $10 million with respect to two excess umbrella policies issued to Avtex Fibers, Inc. ("Avtex") covering the periods from November 1, 1980 to August 1, 1981 and August 1, 1981 to August 1, 1982 ("Avtex Policies"). Each of the Avtex Policies has a $5 million limit of liability and covers 20% of the liability in excess of $26 million through $51 million for each period. Finally, EPA has a claim in the amount of $500,000 with respect to an excess liability policy issued to Sharon Steel Corporation ("Sharon Steel") with a limit of $500,000 (excess of underlying insurance of $500,000) covering

the period from January 1, 1980 to October 1, 1980 ("Sharon Steel Policy"). We set forth below the basis for each of these claims.

1. $1.25 Million Claim under LCP Policy

As you know, the EPA recently entered into an $8.75 million settlement with your office related to the LCP Policy. DOI and NOAA now seek to recover the remaining $1.25 million under that policy in connection with the liability of LCP under Section 107 of CERCLA, 42 U.S.C. § 9607, for natural resource damages and assessment costs for contamination located at Piles Creek and the South Branch Creek in Linden, New Jersey. From 1972–1985, LCP operated a chlorine manufacturing plant in Linden, using the chlor-alkali process, at a location now known as the LCP Chemical Superfund Site ("LCP Linden Site").[1] Contamination from LCP's operations migrated to, and contaminated, Piles Creek and South Branch Creek.[2] Piles Creek is located to the north of the former LCP property and is separated from the former LCP property by another property known as the GAF site. The South Branch Creek runs through a portion of the former LCP property and is generally located to the south of the former LCP property. The hazardous substances at Piles Creek and the South Branch Creek that have caused contamination of water, sediments and biota include heavy metals (mercury, lead, cadmium, copper, arsenic and zinc), polychlorinated biphenyls (PCBs), chlordanes, DDTs, organochlorine pesticides, and polycyclic aromatic hydrocarbons (PAHs).

NOAA has incurred damage assessment costs in the amount of $1,191,962 and DOI has incurred damage assessment costs in the amount of $40,684 in connection with the Piles Creek and South Branch Creek sites. NOAA expects to incur at least $300,000 in future damage assessment costs. In addition, NOAA and DOI have prepared an estimate of the natural resource damages at the Piles Creek and the South Branch Creek sites. These sites, as well as their associated wetlands, support a range of natural resources that have been affected by releases of hazardous substances. Sediments at these locations contain levels of contaminants of concern found frequently to be toxic to benthic invertebrates (amphipods and mussels) in controlled laboratory toxicity tests. The results of field studies demonstrate that invertebrates (fiddler crabs) utilizing habitats at the sites have lower survival and lower densities than invertebrates at reference sites. With respect to surface water, the concentrations of mercury, total PCBs, total chlordane, and total DDTs in fish tissues frequently exceed the levels that are associated with adverse effects on fish in both laboratory and field studies. The concentrations of mercury, total PCBs, total DDTs, and/or dioxin in sediment, invertebrate tissues, and/or fish tissues are sufficient to adversely affect fish and wildlife (i.e., birds and mammals) that forage at the sites. Based on these injuries, NOAA prepared a Habitat Equivalency Analysis ("HEA") to estimate the damages. In the HEA, NOAA first determined baseline conditions and then the amount of service loss that resulted from the contamination. Both past injury and future injury are brought to present value. The HEA then determines the number of acres of wetlands that need to be

[1] In 1991, LCP's successor, Hanlin Group, Inc., filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. In re Hanlin Group, Inc., No. 91-33872 (Bankr. D.N.J.).

[2] In February 2014, EPA selected a remedy for the LCP Linden Site. EPA's recent $8.75 million settlement with Centaur includes a payment for the LCP Linden Site.

created to compensate for the injury. Finally, based on information concerning the cost of wetland creation on a per acre basis, the HEA calculates that cost of a wetland restoration project that would be needed to compensate for the injury. That analysis determined that the damages claim is in the range of $68 - $81 million.[3]

LCP is jointly and severally liable for a total of about $69.5 to about $82.5 million[4] under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). That provision imposes liability on the owner or operator of a facility during the time of the disposal of hazardous substances for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury." LCP is liable for the injury at the Piles Creek and the South Branch Creek sites because hazardous substances from its operations migrated to those locations. LCP's liability is "joint and several" because the hazardous substances contributed by LCP were a "contributing factor" to the injury. See In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 722 F. Supp. 893, 897 n. 8 (D. Mass. 1989). Other potentially responsible parties ("PRPs"), along with LCP, are also jointly and severally liable under CERCLA in connection with these sites.

As a result of LCP's liability discussed above, Centaur is liable, under the LCP Policy, for the remaining $1.25 million under the policy. In order to analyze whether the LCP Policy covers the liability at issue here, we must first determine which state's law would be applied in interpreting the policy. Where an insurance policy, like Centaur's policies, lack a choice-of-law provision, the Illinois choice-of-law rules require that a court employ a most significant contacts test to determine which substantive law would govern the contract. See, e.g., Jupiter Aluminum Corp. v. Home Ins. Co., 225 F.3d 868 (7th.Cir.2000). Under this test, a court considers the following factors: (1) the location of the subject matter (i.e., the location of the insured risk); (2) the place of delivery of the contract; (3) the domicile of the insured or of the insurer; (4) the place of the last act to give rise to a valid contract; and (5) the place of performance; or (6) any other place bearing a rational relationship to the general contract. Laphan-Hickey Steel Corp. v. Protection Mutual Ins. Co., 166 Ill.2d 520, 526-7 (1995). These factors vary in significance depending upon the context of the case. Emerson Elec. Co. v. Aetna Cas. & Sur. Co., 319 Ill.App.3d 218 (Ill.App. 1st Dist. 2001). In applying the most significant contacts test, consideration is also given to the justified expectations of the parties, the predictability and uniformity of the result, and to the ease in determination and application of the law to be applied. Id.

Where the insured risk is located at least principally in a single state, the location of the risk is given greater weight than any other factor in the choice-of-law analysis. Society of Mount Carmel v. National Ben Franklin Ins. Co. of Ill., 268 Ill.App.3d 655 (Ill. App. 1st Dist.1994). Therefore, where an insurance contract applies to property located in a single jurisdiction, the

[3] There was a range of values due to uncertainty concerning the remedial actions that would ultimately be implemented by EPA at the LCP Linden Site or by New Jersey at the GAF site.

[4] These figures are the sum of the past assessment costs, future expected assessment costs, and damages.

law of that jurisdiction will likely apply to any disputes related to the contract, irrespective of the domicile of the insurer or the insured. Where, however, risk locations are scattered throughout several states, the location of the risk is entitled to less weight in the choice-of-laws analysis. Jupiter Aluminum Corp. v. Home Ins. Co., 225 F.3d 868 (7th.Cir.2000). This is because courts generally prefer to enable parties to obtain a consistent interpretation of their policies rather than potentially creating a situation where a single policy would be subject to competing interpretations under the laws of different states. See, e.g., Maremont Corp., 288 Ill.App.3d 721 (Ill. App. 1st Dist.1997). Therefore, where risk locations are scattered throughout several states, other factors may take precedence. One Illinois court has determined that the domicile of the insured is the most relevant factor to be considered where a policy covers risks in several states. Emerson Elec. Co., 319 Ill.App.3d 218.

As discussed in connection with our recent negotiation of the EPA claim under the LCP Policy, we believe that New Jersey law would likely govern the interpretation of the policy because, at the time the policy was issued, LCP had facilities in several states, including New Jersey, Georgia, New York, North Carolina, Ohio and West Virginia, and LCP's headquarters was in New Jersey. Under the New Jersey rules for allocating insurance liability, there appears to be sufficient liability to trigger the full $1.25 million remaining under the LCP Policy. As we discussed in connection with the negotiation of the EPA claim, under New Jersey law a "pro rata" approach is employed to allocate the insurance liability in cases where an insured is covered by multiple policies. See Carter-Wallace v. Admiral Ins. Co., 154 N.J. 312, 712 A.2d 1116 (N.J. 1998); Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974 (N.J. 1994). Under New Jersey's "pro-rata" approach, the amount to be allocated is the full joint and several liability of the PRP. See Franklin Mutual Ins. Co. v. Metropolitan Prop. & Casualty Ins. Co., 406 N.J. Super. 586, 594, 968 A.2d 1191, 1195-96 (N.J. Super. Ct. App. Div. 2009). This joint and several amount is allocated only amongst the PRP's own insurers, and not amongst the insurers of all of the PRPs at a site. Id. The joint and several liability figure is allocated amongst a PRP's insurers by first determining the total amount of insurance and self-insured amount for all of the years in question and then allocating the liability to each of the years based on the total amount of insurance or self-insurance for that particular year. Once it is determined how much of the total liability is allocated to each year, the liability that particular year is based on the layering of the policies in that year. Carter-Wallace, 154 N.J. at 326-27; Franklin Mutual, 986 A.2d at 1195-96. Here, the issue would be how the liability would be allocated amongst the various insurers of LCP during the period of time from 1972 – 1985, when LCP was operating at the site.

We obtained information concerning LCP's insurance coverage and provided that information to you in connection with our negotiations of the EPA claim under the LCP Policy. Based on that information, it appears that about 20% of the liability at issue here should be allocated to the 1982–83 period, when the LCP Policy was in effect, which would result in an allocation of about $14 to $16 million (20% of the range of $69.5 to about $82.5 million). Given that your office agreed to pay $8.75 million to EPA under the LCP Policy, the liability to EPA should be viewed as sufficient to cover at least $19.75 million of the liability allocated to the 1982-83 time period ($11 million to exhaust the underlying insurance and an additional $8.75

million for liability under the policy). Thus, we would only need to allocate an additional $1.25 million to the 1982-83 time period to reach the $21 million figure needed to trigger full liability under the policy. Since the amount of the liability that should be allocated to the 1982-83 time period - $14 to $16 million - is well in excess of the $1.25 million amount, the United States is entitled to recover the entire $1.25 million remaining on the policy.

2. $10 Million Claim under Avtex Policies

Before it closed in 1989, the Avtex plant in Front Royal, Virginia, was a major rayon manufacturing facility. The plant is a 440-acre facility located directly adjacent to the Shenandoah River. Avtex conducted manufacturing operations at the plant from 1976 until 1989, when Avtex closed the plant.[5] As a result of manufacturing operations at the plant from 1940 to 1989, the Avtex Fibers, Inc. Site ("Avtex Site") was contaminated with a variety of hazardous substances including PCBs, zinc and carbon disulfide.[6]

The EPA Superfund program has been involved at the Avtex Site from the early 1980s to the present. During that period of time, EPA has selected a series of removal actions. In addition, EPA has selected remedial actions for the site in five separate Records of Decision ("RODs") issued from 1988 to 2010. Under a 1999 consent decree, FMC Corp.[7] agreed to implement certain of the response actions selected by EPA at the Avtex Site. EPA has incurred unreimbursed past costs (including prejudgment interest under CERCLA) in the amount of $91,395,779, through December 20, 2016.[8] The remaining work to be implemented at the Avtex Site primarily involves operation and maintenance of selected remedies. Although FMC has agreed to perform the operation and maintenance, Avtex remains liable for this work. EPA has estimated that the present value of this future operation and maintenance work alone is

[5] After closing the plant, Avtex filed for bankruptcy. See In re Avtex Fibers Front Royal, Inc., No 90-20290TMT (Bankr. E.D. Pa.)

[6] The United States Department of Commerce is a PRP in connection with the Avtex Site due to its involvement with rayon manufacturing during World War II. See FMC Corp. v. United States Dept. of Commerce, 29 F.3d 833 (3d Cir. 1994) (in contribution action filed by FMC, court upheld district court ruling that Department of Commerce was liable under CERCLA in connection with the site). The Department of Commerce, as well as several other federal agencies (NASA and several Department of Defense components), have entered into agreements with FMC whereby they have agreed to pay for a portion of FMC's costs incurred in connection with the Avtex Site.

[7] FMC operated at the Avtex Site from 1963 to 1976.

[8] EPA estimates that it may, at some point in the future, recover an additional amount of about $1.5 to $2 million under the Plan of Reorganization in the Avtex bankruptcy, which provides that EPA is to receive a certain portion of the proceeds of the sale of the Avtex property by a local economic development authority that currently holds that property and that is attempting to sell the property.

$45,103,823.[9] Thus, the total liability to EPA for the Avtex Site is at least $136,499,602. Avtex is jointly and severally liable to the United States, under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for this amount.

Avtex is also liable for natural resource damages including assessment costs in connection with the Avtex Site. Natural resources subject to the jurisdiction of DOI have been adversely affected by releases of PCBs at the Avtex Site. Fish have been injured through exposure to PCBs. Fish in the South Fork of the Shenandoah River have body burdens of PCBs above applicable toxicity limits. In 1989, the Virginia Department of Health put into effect a "do not eat" advisory for the North and South Forks of the Shenandoah River, and the Shenandoah River, due to PCB contamination. In 2004 the fish consumption advisory was revised, retaining the "do not eat" advisory for carp, channel catfish, and sucker species, and recommending human consumption of no more than 2 half-pound meals per month of rock bass, sunfish species, smallmouth bass, and largemouth bass. Since PCBs bioaccumulate, contaminated fish in turn serve as a source of contamination for higher trophic animals such as piscivorous birds and mammals. Based on a food web analysis, piscivorous birds and mammals, such as mink, have suffered injuries as a result of exposre to the PCB releases at and from the Avtex plant.

DOI has incurred $393,676 in damage assessment costs in connection with the Avtex Site. DOI has also determined that it has a claim in the amount of $12.4 million for recreational fishing loss and in the amount of $2,068,896 for aquatic damages. In addition, DOI has estimated an amount of $156,705 for its future restoration planning and oversight costs. Avtex is jointly and severally liable for natural resource damages, including assessment costs, in the total amount of $15,019,277 because hazardous substances disposed of by Avtex were a contributing factor to the injury. Thus, Avtex's total CERCLA liability in connection with the Avtex Site, to both EPA and DOI, is at least $151,518,879. Other PRPs, along with Avtex, are also jointly and severally liable under CERCLA in connection with the Avtex Site.

As a result of the Avtex's CERCLA liability discussed above, Centaur is liable under the Avtex Policies for a total amount of $10 million, with $5 million in property damages limits under each policy. Since Avtex had manufacturing facilities in Pennsylvania, West Virginia and Virginia during the time that the Avtex Policies were in effect, we believe, for the reasons discussed above, that Illinois law would adopt Pennsylvania law to interpret the Avtex Policies, as the headquarters of Avtex was located in that state (and where the policies were addressed and the insurance broker was apparently located). Under Pennsylvania law, the entire joint and several liability of Avtex can be allocated to the 1980–1982 time-frame at issue here. Pennsylvania courts have rejected the "pro rata" approach and have, instead, adopted a joint and several liability analysis. J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 626 A.2d 502 (Pa. 1993). See also Gen. Refractories Co. v. First State Ins. Co., 500 F.3d 306, 313 (3d Cir. 2007) (quoting J.H. France and noting that "Pennsylvania law . . . plainly holds that once multiple policies have been triggered for an indivisible loss . . . the insured is 'free to select the policy or policies under which it is to be indemnified.'"); Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1449 (3d Cir.1996) (noting that in J.H. France the Pennsylvania Supreme Court

[9] This figure does not include future costs that EPA may incur at the Avtex Site which are not part of operation and maintenance and which are not chargeable to FMC under the 1999 consent decree.

held that "the insurers whose coverage had been triggered were jointly and severally liable for the full amount of the claim up to policy limits, and . . . the insured was entitled to select the policy or policies under which it would be indemnified"). Given the amount of liability at issue here, there is more than sufficient liability to trigger the full $5 million under each of the Avtex Policies. In reaching this conclusion, we assumed that Avtex had a total of $51 million of insurance coverage for each of the years that the policies were in effect. But even if there was additional insurance during these two years, this conclusion would remain the same unless the additional insurance was in excess of $50 million for each of the years.[10]

3. $500,000 Claim Under Sharon Steel Policy

Sharon Steel manufactured steel at its Farrell Works facility in Pennsylvania from 1900 to 1992, when it shut down the plant.[11] During its operations, Sharon Steel disposed of various hazardous substances at a 325-acre parcel in the nearby City of Hermitage, Pennsylvania. This parcel is currently known as the Sharon Steel Corporation (Farrell Works Disposal Area) Superfund Site ("Farrell Works Site"). Sharon Steel transported waste and byproducts of the manufacturing process on rail cars across the Shenango River and discarded the waste down embankments or piled it into large mounds in several areas of the site adjacent to the Shenango River. From 1949 to 1981, millions of gallons of waste liquids (hydrochloric, sulfuric, and chromic acids and oils) were poured onto the hot slag wastes, which were previously disposed of at the site. This practice caused heavy metals to leach into the groundwater until 1981, when Sharon Steel was ordered by the Pennsylvania Department of Environmental Protection to stop disposing the waste liquids in this manner. Although the disposal of waste liquids stopped in 1981, Sharon Steel continued to stockpile slag at the Farrell Works Site until operations at the plant ceased in December 1992. Groundwater and soil was ultimately contaminated with metals, polyaromatic hydrocarbons, PCBs and pesticides. Run-off and erosion from the Farrell Works Site has affected the adjacent Shenango River and nearby habitats.

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[10] Robert Caron was the On-Scene Coordinator at the site from 1989 to 1991. Mr. Caron resigned from EPA in March 1992 after an investigation revealed that he had falsified his credentials and provided perjured testimony concerning his credentials in several cases. Subsequently, Mr. Caron pled guilty to a criminal charge of making false declarations in violation of 18 U.S.C. § 1623. We have excluded from EPA's costs all of EPA's payroll and travel costs associated with Mr. Caron, as well as the indirect cost amounts associated with such costs.

O.H. Materials was an EPA contractor that billed about $11 million for work done at the site. In the 1990s, allegations were made concerning problems with invoices submitted by O.H. Materials in connection with the Fike/Artel Chemical Superfund Site located in West Virginia. EPA is not aware of any allegations of problems with the invoices submitted by O.H. Materials in connection with the Avtex Site.

[11] After shutting down the plant, Sharon Steel filed for bankruptcy. In re Sharon Steel Corp., No. 92-10958-E (Bankr. W.D. Pa.). This was Sharon Steel's second bankruptcy. It had previously filed for bankruptcy in 1987. In re Sharon Steel Corp., No. 87-207-E (Bankr. W.D. Pa.).

EPA selected remedies for the Farrell Works Site in RODs issued in 2006 and 2013. The remedies involve the placement of a cap on the site as well as long-term groundwater monitoring. EPA initiated construction of one of these remedies in December 2016 and expects to begin construction of the second remedy sometime this year. There is also a removal action being undertaken at the Farrell Works Site that is not yet complete. As of November 30, 2016, EPA had paid $12,651,693 in unreimbursed past costs (including prejudgment interest run through August 17, 2017). EPA estimates that the present worth of the future costs of implementing the remedial action at the Farrell Works Site is about $36 million. As a result, Sharon Steel is jointly and severally liable as a former owner/operator of the site at the time of disposal, under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), in the amount of $48,651,693. Other PRPs, along with Sharon Steel, are also jointly and severally liable under CERCLA in connection with the Farrell Works Site.

As a result of Sharon Steel's CERCLA liability discussed above, Centaur is liable for the full $500,000 limit under the Sharon Steel Policy. Since the Sharon Steel Policy appears to have insured locations in several states, under the choice of law rules in Illinois the policy would likely be interpreted under the law of Florida because NVF, the parent of Sharon Steel at the time of issuance of the policy, appears to have had its headquarters in Florida. With respect to the allocation of insurance liability, we have found one case holding that the "joint and several" theory should be applied, see CSX Corp. v. Admiral Ins. Co., 1996 U.S. Dist. LEXIS 17125 (M.D. Fla. November 6, 1996). If the "joint and several" theory were applied, there would be ample liability here to trigger the full $500,000 limit under the policy. If a Florida court were to follow the "pro rata" approach, the result is unclear as we do not have information concerning Sharon Steel's insurance coverage during the years it operated at the Farrell Works Site.

We look forward to working with you in connection with these claims. We expect that these three claims will be the final claims submitted by the United States in the Centaur rehabilitation proceeding. Upon the resolution of these claims, we expect that the Civil Division of the Justice Department will provide your office with a release under the Federal Priorities Act.

Respectfully submitted,

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